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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of:

Application by SBC Communications
Inc., Southwestern Bell Telephone
Company, and Southwestern Bell
Communications Services, Inc. d/b/a/
Southwestern Bell Long Distance for
Provision of In-Region InterLATA
Services in Oklahoma

CC Docket No. 97-121

**COMMENTS OF LCI INTERNATIONAL TELECOM CORP. IN SUPPORT OF
MOTION TO DISMISS AND REQUEST FOR SANCTIONS FILED BY THE
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	COMMENTS.....	2
1.	SWBT'S Application Is Defective Under Track A.....	2
2.	SWBT's Application Cannot Proceed At This Time Under Track B.....	5
3.	The Commission Should Assess Sanctions Against SWBT For Filing A Frivolous Application	8
III.	CONCLUSION.....	9

I. INTRODUCTION

LCI International Telecom Corp. ("LCI") submits these comments in response to Public Notice No. 97-864 issued by the Commission on April 23, 1997. While LCI is not currently offering local exchange service in Oklahoma, the issues raised by the Commission in its Notice are important legal issues that will be relevant to subsequent section 271 applications for those regions in which LCI is currently attempting to enter as a local service competitor.

LCI joins in the motion to dismiss and request for sanctions filed by the Association of Local Telecommunication Services ("ALTS") on April 23, 1997. The Commission should grant the motion and request for the following reasons:

1. An application under section 271(c)(1)(A) (the so-called "Track A") requires that the RBOC have an approved interconnection agreement with a facilities-based competing provider who, through the implementation of that agreement, is offering local telephone service to business *and* residential customers in the region in question. SWBT's application is defective because Brooks Fiber, the only facilities-based competing provider with whom it has an interconnection agreement, is not yet selling local telephone service to residential customers.

2. SWBT cannot submit its application under § 271(c)(1)(B) (the so-called "Track B") because it has not shown -- and cannot show -- that the competing providers with whom it has negotiated interconnection agreements have "violated" the terms of the agreements by failing to implement them within a reasonable period of time; and

3. Sanctions are appropriate here because (a) SWBT turned a blind eye to the Commission's recent admonition to section 271 applicants of "their obligation under [Commission] rules to maintain 'the continuing accuracy and completeness of the information' furnished to the Commission"¹; and (b) they will likely deter other RBOCs from filing future section 271 applications that are known to be unmeritorious.

These points will each be discussed in more detail below.

II. COMMENTS

1. SWBT'S Application Is Defective Under Track A

If the RBOC's application to offer in-region interLATA service is submitted under Track A, the RBOC must be able to demonstrate that:

1. It has entered into one or more binding agreements that have been approved under section 252;

2. Pursuant to those agreements, it is "providing access and interconnection to its network facilities" to a facilities-based competing provider; and

3. The competing provider, through the access and interconnection provided by the RBOC under the approved agreement, is offering local telephone service in the region in question to both business and residential customers, in competition with the RBOC.

47 U.S.C. § 271(c)(1)(A).

¹ *Order In the Matter of Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-1, FCC Order No. 97-40 (released February 7, 1997) at ¶ 23, quoting 47 C.F.R. § 1.65(a).

There should be no doubt that Congress intended that the interconnection agreements would be implemented and the competing providers operational before a Track A application could be granted by the Commission. This issue was first addressed in the Commerce Committee's report to the House of Representatives on July 24, 1995:

Under section 245(a)(2)(A) [which was eventually adopted as section 271(c)(1)(A)], the Commission must determine that there is a facilities-based competitor that is providing service to residential and business subscribers. This is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition. In the Committee's view, the "openness and accessibility" requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements.

* * *

The Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service somewhere in the state prior to granting a BOC's petition for entry into long distance.

H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 76-77 (1995) (emphasis supplied).

It was also specifically addressed in the Conference Reports issued by the House and Senate shortly before enactment of the Telecommunications Act:

For purposes of new section 271(c)(1)(A), the BOC must have entered into one or more binding agreements under which it is providing access and interconnection to one or more competitors providing telephone exchange service to residential and business subscribers. **The requirement that the BOC "is providing access and interconnection" means that the competitor has implemented the agreement and the competitor is operational.**

H.R. Conf. Rep. No. 104-458, 104th Cong., 2nd Sess. 148 (1996); S. Rept.

No. 104-230, 104th Cong., 2nd Sess. 148 (1996) (emphasis supplied) (collectively

referred to as "Conference Reports").² The Conference Reports, in particular, are "entitled to great weight in determining Congressional intent." *Cohn v. United States*, 872 F.2d 533, 534 (2nd Cir.), *cert denied*, 493 U.S. 848 (1989). *Accord*, *RJR Nabisco, Inc. v. U.S.*, 955 F.2d 1457, 1463 (11th Cir. 1992); *Austin v. Owens-Brockway Glass Containers, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996) ("conference reports are the most persuasive evidence of legislative intent after the statute itself").

SWBT's application under Track A is based exclusively on its interconnection agreement with Brooks Fiber Communications of Oklahoma, Inc. ("Brooks Fiber"), an agreement that was executed on August 29, 1996, and approved by the Oklahoma Commerce Commission on October 22, 1996. See Brief in Support of Application by SBC Communications, Inc. [et al.] for Provision of In-Region InterLATA Services in Oklahoma ("SWBT's Brief"), p. 4, n. 3, and Appendix-Volume III, Tab 2. It is clear that SWBT recognizes what Track A requires of it, because SWBT has contended that Brooks Fiber **"qualifies as a facilities-based local service provider,"** and that Brooks Fiber **"actually furnishes local exchange**

² The Antitrust Division of the Department of Justice has also recognized that **operational** competition to the RBOCs monopoly is what is significant under section 271. In its Supplemental Working Draft of Further Issues and Information to Consider in Evaluating BOC Section 271 Applications for In-Region InterLATA Entry, the Division encourages the State Commissions, in their section 271 compliance proceedings, to determine, among other things, "what volumes of orders for checklist items has the BOC been fulfilling", and whether the BOC is "capable of handling current levels of demand for services by competitors in a reasonable and timely manner." And, commenting on this issue in recent speech, the Honorable Joel I. Klein, Acting Assistant Attorney General of the Antitrust Division, stated, "we just want to make sure that gas actually can flow through the pipeline; and the best way to do that is to see it happen." Honorable Joel I. Klein, *Preparing for Competition in a Deregulated Telecommunications Market*, Address at the Glasser Legalworks Seminar (March 11, 1997).

service to both residential and business customers in Tulsa and Oklahoma City pursuant to its interconnection agreement with SWBT." SWBT's Brief at pp. 6 & 9 (emphasis supplied).

While SWBT recognizes Track A's requirements, it is now apparent from ALTS' motion that SWBT's description of the nature of Brooks Fiber's local telephone business in Oklahoma is, in fact, misleading. Brooks Fiber is **not** currently offering local telephone service to residential customers in Oklahoma in competition to SWBT; it is merely testing SWBT's residential resale systems by "running test circuits in the homes of four Brooks' employees in Oklahoma." Affidavit of John C. Shapleigh, dated April 21, 1997, at ¶ 5. Mr. Shapleigh further states that Brooks Fiber is not currently selling residential services in Oklahoma because certain facilities are not yet available to it there, including the ability to use unbundled loops due to incomplete collocation arrangements and the lack of final pricing rules for unbundled loops at reasonable rates. *Id.* at ¶ 6.

Given these facts, SWBT's application is patently defective under section 271(c)(1)(A). The Commission should, therefore, grant ALTS' motion at this time so that the Commission and interested parties do not have to undertake the enormous burden and expense of reviewing and responding in detail to SWBT's voluminous application.

2. SWBT's Application Cannot Proceed At This Time Under Track B

The fact that Brooks Fiber is not yet offering local telephone service to residential customers in Oklahoma does not mean that SWBT can proceed to seek approval of its application under Track B. As SWBT recognized in its brief in support of its application, the Track B alternative was enacted to "ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria

[established in Track A] has sought to enter the market." SWBT's Brief at p. 13, quoting from the Conference Reports at 148. Track B accomplishes this purpose by permitting the RBOC to rely upon a statement of terms and conditions in lieu of approved agreements when no competing provider has "requested" access and interconnection within three months prior to the date on which the RBOC files its section 271 application. The absence of such a "request" is the condition precedent that the RBOC must satisfy before it can proceed under Track B.

That condition precedent has not been satisfied here. Brooks Fiber is, by SWBT's own admission, a facilities-based competitor that is seeking to enter the Oklahoma market. To that end, Brooks Fiber not only "requested" access and interconnection, it negotiated and signed a binding interconnection agreement with SWBT, which agreement was subsequently approved by the Oklahoma Commerce Commission under section 252.³ Indeed, in the materials that SWBT submitted to the Oklahoma Commerce Commission to obtain its approval, SWBT unequivocally acknowledged that its agreement with Brooks Fiber was of the type that, **once implemented**, would provide SWBT with the basis for seeking approval under Track A. This is what SWBT told the Oklahoma Commerce Commission:

Implementation of the interconnection agreement will provide end-users with additional choice for local telephone service subject to the same service quality standards and service capabilities as those required by the Commission's rules in which end-users have

³ The agreement was signed eight months and approved six months before SWBT filed its section 271 application with the Commission. Thus, the three month window of Track B does not apply here, and SWBT's apparent contention that no such "request" was made until Brooks Fiber commenced local service on January 15, 1997 is frivolous. See Brief at p. 15 n. 15.

traditionally come to expect from their local service provider.

* * *

The interconnection agreement provides Brooks access and interconnection to SWBT network facilities for the provision of telecommunications services to both residential and business customers. Further, such services will be offered either exclusively over Brooks' own facilities or predominantly over Brooks' facilities in combination with the resale of SWBT services.

Affidavit of Robert E. Stafford, Division Manager -- Regulatory and Industry Relations of Southwestern Bell Telephone Company, dated August 30, 1996, Appendix -- Vol. III, Tab 2.

Clearly, SWBT's Track A agreement with Brooks Fiber has not been fully implemented such that residential consumers have an "additional choice for local telephone service" in Oklahoma. If this lack of full implementation is the result of unreasonable conduct on the part of Brooks Fiber, then Track B provides SWBT with an explicit outlet: SWBT can proceed to obtain from the Oklahoma Commerce Commission a certification that Brooks Fiber has "violated the terms of [its] agreement by failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." § 271(c)(1)(B). Upon the receipt of such certification, SWBT can then proceed with its application before this Commission under Track B.

Nowhere in its application does SWBT suggest that Brooks Fiber has intentionally delayed implementation of the interconnection agreement in violation of the terms of that agreement. Indeed, the material submitted by Brooks Fiber in connection with ALTS' motion indicates that any delay in implementation of the interconnection agreement is SWBT's own fault, not Brooks Fiber's. Given these facts, SWBT cannot proceed with its application at this time under Track B. The Commission should, therefore, grant ALTS' motion. The Commission should also

enter an order that directs other RBOCS not to attempt to proceed before this Commission under Track B if there is an existing, but not yet fully implemented interconnection agreement, unless and until the RBOC has obtained the certificate from the State commission as mandated by section 271(a)(1)(B).

3. The Commission Should Assess Sanctions Against SWBT For Filing A Frivolous Application

The section 271 application process designed by Congress places an enormous burden upon this Commission, State commissions, the Department of Justice and interested parties, particularly smaller carriers such as LCI. The RBOCs have complete control over when they file their applications, thus commencing the 90-day review process, and there is no statutory limit on the number of times any given RBOC can file an application.

Experience is beginning to show that the RBOCs are prepared to abuse their privilege of unlimited filings -- to engage in what the ALTS' motion so aptly referred to as "a Section 271 lottery." This Commission has already faced one patently defective section 271 application -- the application filed by Ameritech Michigan in January of this year. It now faces another.

LCI submits that the RBOCs will continue to "roll the dice" on their section 271 applications, and will eventually subvert the integrity of the section 271 process, unless sanctions for frivolous filings are imposed. Sanctions against SWBT are appropriate because SWBT had fair warning from this Commission of its obligation to file accurate and complete information in support of a section 271 application. SWBT turned a blind eye to this warning. It represented to this Commission that Brooks Fiber was "furnishing" both residential and business service in Oklahoma, knowing full well that the only residential service offered by Brooks was on a test basis to four of its own employees. There being no "good ground" to support its representation or its application under Track A [See 47

C.F.R. § 1.52], this Commission should deem the application frivolous under 47 C.F.R. § 152, and enter appropriate sanctions.

III. CONCLUSION

For the foregoing reasons, LCI requests that the Commission enter an order (1) dismissing SWBT's section 271 application for Oklahoma; (2) directing other RBOCs not to attempt to proceed with an application under Track B if there is an existing but not fully implemented interconnection agreement, unless and until the RBOC has obtained the certification from the State commission mandated by section 217(a)(1)(B); and (3) imposing sanctions on SWBT.

DATED: April 25, 1997

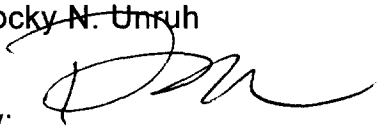
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Respectfully submitted,

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I hereby certify that the foregoing Comments of LCI International Telecom Corp. in Support of Motion to Dismiss and Request for Sanctions Filed by the Association for Local Telecommunications Services was served on April 28, 1997, on the following persons by first-class mail or hand service as indicated.


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